No. .....

IN THE

SUPERIOR COURT

OF THE

STATE OF CALIFORNIA,

In and for the City and County of San Francisco.

J. A. COOLIDGE,
Plaintiff,

vs.

I. S. KALLOCH, Mayor,
Defendant.

Argument of W. T. Baggett upon Defendant's Demurrer.

W. T. BAGGETT and
H. E. HIGHTON.
Attorneys for Defendant.

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IN THE

SUPREME COURT

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State of California.

In the Matter of ISAAC S. KALLOCH, Mayor of the City and County of San Francisco.

Argument in Support of Respondent's Demurrer.

May it please the Court:

From the view I have taken of this proceeding, I have thought it unnecessary to direct attention to, and discuss but a single proposition. There are other important issues raised by the motion and demurrer filed herein by the defendant, but they will, I am confident, be submitted by my associate with his usual thoroughness and ability. From what has been stated by my associate, your Honors are aware of the position I shall attempt to main-

tain. The investigation I have given the subject, I am pleased to say, has forced a deep conviction upon me as to the correctness of the conclusions arrived at. The position taken is briefly this: Under the statute upon which rests this proceeding, no charge can be investigated and sustained that is not an offense committed in the performance or omission of duties pertaining to an office—duties enjoined and imposed by law as acts to be performed by *the officer*, and for which purpose the office was created.

I.

THE ACT ON ITS FACE SHOWS THAT IT RELATES TO DUTIES PERTAINING TO THE OFFICE.

The proceeding, as designated by the complaint itself, is a special proceeding under the provisions of an Act of the Legislature of the State of California, entitled "An Act providing for the removal of civil officers for a violation of official duties," approved March 30, 1874. Without reading the Act at length, I desire to call the attention of the Court first to its title: "An Act for the removal of civil officers for a violation of *official* duties;" and next, to the language of the Act prescribing the offense: "Or any other officer who shall be "guilty of a willful violation of any of the pro- "visions of the statute under which he or they "were or may hereafter be elected or appointed,"

etc., " who shall be guilty of any *other* willful vio-
" lation of *official* duty shall be deprived of his
" office;" and next, to section 3 of the Act: "This
" Act shall not be construed to repeal or impair
" the provisions of any other Act concerning offi-
" cers in force at the time of the passage hereof,
" but shall be *construed* to be a *cumulative* remedy
" for the enforcement of *official* duty, and *not*
" *otherwise.*"

The language of the statute is so plain and conclusive that I am at a loss to know why the learned counsel for the complainant should determine to build a case upon it supported by allegations of facts going to establish offenses committed, not within the scope of official duties—duties pertaining to the office of Mayor—but committed as a citizen, if at all.

II.

WHY THE ACT IS RESTRICTED TO SUCH DUTIES.

Aside from the language of the Act, there is abundant reason for restricting the investigations thereunder to acts done in the performance of duties pertaining to the office.

In the first place the proceeding is summary, and a trial by jury is prohibited. The reason is apparent, to-wit: the Court being presumptively in full possession and knowledge of all the laws pre-

scribing the duties of public officers, can readily and speedily pass upon the guilt or innocence of the officer if the investigation is confined simply to that of *official* duty. But should the investigation be limitless, running from a consideration of acts scarcely amounting to moral turpitude to the highest and most infamous crimes known to the law, from acts within, and acts without, the prescribed functions of the office, who would doubt the impropriety of such an act? The Legislature never contemplated such an unreasonable thing. If all the acts, *private* as well as public, done within the period of an official term, can be dragged before a court to determine the question whether a man is morally good enough to hold an office to which the people have elected him, he certainly should have the right to demand a jury to pass upon a question involving so much to himself—one in which his reputation as a citizen is at issue; for the officer may be guilty of a willful violation of an official duty, and yet not be guilty of an offense touching in the least his reputation. The word "willful" as used in the statute is to be applied to the intent with which the act is done or omitted, and implies simply a purpose or willingness to commit the act or make the omission, and does not imply an attempt to violate law criminally.

(Sec. 13,007, sub. 1, Penal Code.)

I do not overstate the effect of this proceed-

ing when I charge that the theory upon which it is based permits an investigation into the *intent* of every PRIVATE act of an officer, that there might be found a basis or a cause for removal from office. Where does such a conclusion bring us? To this:

1. That the tenure of office depends upon the *morale* of the citizen.

2. That the *morale* of a citizen, who is an officer, may be inquired into in a proceeding to remove him from office.

3. That there is no limit or restriction to such inquiry. It may extend to the proper government of a household; it may extend to a question of the payment of just debts; it may even extend to a question of cleanliness or decent habits. For these are all duties that should be performed by respectable citizens.

I say this is what we are driven to if we adopt the theory of this complaint. Such is the character of the matters charged in the complaint, so far as the question of "official duties" is concerned, notwithstanding the complainant has artfully appealed to each charge "in his official capacity." This device will not serve him. The Court takes judicial knowledge of the duties enjoined by law; and when the complainant charges an offense, done without and not in the performance of such official duties, the "suggestion" by complainant that it was done officially must be treated as surplusage.

My purpose is not to treat lightly the grave charges made in some portions of this complaint. I have alluded to insignificant matters respecting the conduct of a private citizen to show that they might be inquired into and made the basis of a proceeding for the removal of an officer under this statute, with the same propriety as those alleged in this complaint. I shall even assert that, no matter how infamous the offense charged, unless it was committed in the performance of duties pertaining to the office, it can form no basis for a proceeding under *this* statute. I assert that should an officer be guilty of larceny or gaming he could not be removed from office under this statute, unless the larceny was committed by him in the performance of some official duty.

I must not be understood as saying that an officer may commit such crimes against the dignity of the State, and not be amenable to its laws. The law has made ample provision for the punishment of all such offenses, and set apart a forum and a procedure with a view to such punishment; always paying deep regard to the rights of the offender. But it is not by a proceeding of the nature of the one at bar, and under a statute specially designated one for the enforcement of OFFICIAL duties.

The statute upon its face says it is cumulative; that all other statutes concerning officers remain in full force. So that the machinery of the law is

sufficient to meet such a case as is made by the allegations of the complaint, if sufficient otherwise.

III.

IF THE STATUTE IS INTENDED TO COVER SUCH OFFENSES AS CHARGED IN THE COMPLAINT, IT IS UNCONSTITUTIONAL.

The constitutional provision under which the statute was passed, and which alone authorizes the enactment of a statute prescribing a procedure for the removal of civil officers otherwise than by impeachment, is in these words: * * * * "All other civil officers shall be tried for misde- "meanor in office in such manner as the Legisla- "ture may provide."

The civil officers referred to are all others than the Governor, Lieutenant-Governor, Secretary of State, Controller, Treasurer, Attorney-General, Surveyor-General, Justices of the Supreme Court, and Judges of the District Court.

The language here used by the Constitution is, "shall be tried for *misdemeanors in office*"—that is, official misdemeanors. If it was not intended to restrict the trial to acts — amounting to misdemeanors—done in the performance of and pertaining to the duties of the office, why

use the words "in office." If it was intended otherwise, these words could and should have been omitted. Giving the provision the construction that must be contended for in order to sustain the constitutionality of the statute, these words are surplusage; for the provision would convey the same meaning without them. It would then read "All other civil officers shall be tried for misdemeanors in such a manner as the Legislature may provide."

We see that the Legislature is restricted in its power to pass laws upon this subject.

1*st*. The enactment must make provision only for a trial for acts declared by statute to be misdemeanors.

2*d*. The trial must be for misdemeanors *in office* —misdemeanors committed in the exercise of the duties pertaining to the office.

If the statute under which this proceeding is brought is to be construed to be so far-reaching in its application as to, like a drag net, encompass every crime or offense known to the law, then I contend that it is unconstitutional, as having been passed by the Legislature in the exercise of powers in excess of constitutional authority.

If the statute here under consideration was couched in unmistakable language, containing a positive declaration that *any* violations of duty— that any act in violation of any of the penal

statutes of the State, would be cause for the removal of the officer, it would undoubtedly be unconstitutional. But I do not believe that such was the intention of the Legislature. It desires to keep strictly within the prescribed limits as fixed by the Constitution. All the Acts passed upon the subject show this. They meant to confine the trial of an officer to offenses—amounting to a misdemeanor—committed in the performance of some official act. The provision of the Penal Code already referred to (section 758) provides for an accusation in writing against an officer for "willful or corrupt misconduct in office," to be presented by the grand jury. This provision was intended to be in furtherance of the constitutional provision referred to. Note the language: "Willful and corrupt misconduct *in office*." The constitutional provision is "misdemeanor in office." A corrupt misconduct in office would undoubtedly be a misdemeanor in office. A willful misconduct might not be, unless made so by statute. So there seems to be no excess of power in this case; and the statute seems in unison with our construction of the Constitution—to-wit, that the offense must have been committed in the performance of some official duty.

Section 772 of said Code is a part of a statute passed in 1853, and carried into the Code at its adoption. Its evident object was to provide a *summary* proceeding for the removal of officers

for certain offenses committed in the execution of the duties pertaining to the office—to wit, for charging and collecting illegal fees for services rendered *in the office*, and for a neglect or refusal to perform the official duties pertaining to his office. In 1874 the statute under which the complaint is framed was passed. As already shown, it provides for the removal of civil officers for violation of *official* duties.

It is cumulative, as is stated in the Act itself, and was intended to apply to a special class of officers—to-wit, those holding, controlling, building, or managing any public building; or holding, controlling, managing, or disbursing any of the public funds of the State, city, or county, or any person acting under and by the authority of such officers.

All other things, acts, and matters going to constitute an offense against the laws of the State, and which may be misdemeanors or felonies, must be prosecuted by *indictment* and punished as for misdemeanors or felonies; and in certain cases a conviction works a forfeiture of office, which forfeiture must be declared by an action brought by information of the Attorney-General of the State (13,074 Penal Code) and the officer ousted; as, for instance, "Every public officer "who for any gratuity or reward appoints "another person to a public office * * * "is punishable by a fine not exceeding five

" thousand dollars, and in addition thereto " forfeits his office," etc. Section 13,010 Penal Code provides that the omission to specify or affirm any ground for a forfeiture of office, or of powers already conferred by law for the removal of officers, etc., does not affect such forfeiture or power.

There was sufficient power at common law by the proper proceedings to meet all cases of dereliction of duties by officers.

The leading case of *Rex* vs. *Richardson*, 1 Burr, 517, 31 Geo. II., establishes the doctrine that all officers of a municipal corporation may be removed in three classes of cases:

1st. For offenses that are *infamous*, and not connected with the exercise of the duties of the office; but such must first be supported by a conviction.

2d. For official misconduct. And,

3d. For mixed acts.

A case, reported in 2 Binn (Pa.), 448, supports this ancient but firmly established doctrine.

So, therefore, we see that most ample provision has been made for the punishment of officers committing offenses against the laws of this State; and it does not become necessary to try such charges as are made by this complaint, under this statute, in order that the respondent shall not go unpunished.

But if I am wrong in my interpretation of the constitutional provision, and it be held to give authority to the Legislature to pass laws for the removal of officers for any act against the peace and dignity of the State, then I urge that the section of the Penal Code (758) providing for the removal of officers by accusation, presented by the grand jury, for willful or corrupt misconduct in office, was intended to apply to all misdemeanors committed while in office; and the statute here under consideration was intended to apply to violation of duties *pertaining* to the *office.* This construction can be given those statutes without the least embarrassment to the machinery of the State constructed for the punishment of persons holding office. In support of the views heretofore expressed, I cite the following cases:

In *The Mayor, etc.*, vs. *Shaw*, 16 Ga. 172, Starnes, J., delivering the opinion of the Court, said:

"But waiving this, let us look to the more im-
" portant question—was the Marshal properly re-
" moved from office?

"The amendment to the charter of the city of
" Macon, passed February 22d, 1850, authorizes
" the Mayor and City Council to dismiss the Mar-
" shal, for malpractice in office or neglect of duty.

"The charge against the Marshal in this case
" was gambling in the city of Macon. This was
" proven, and nothing else appears in the record

" as proof of malpractice in office or neglect of " duty. Did this constitute malpractice in office?

" The word *malpractice* cannot be here used in " the technical sense of the term. It is not em- " ployed in the sense of *mala praxis*. That is to " say, it does not signify that unskillful practice " in a professional person, whereby some other " person is injured. Nor does it mean mere ne- " glect of duty; for neglect of duty is, in so many " words, specified in the Act and in the same sen- " tence. It could only signify some abuse of the " duties of the Marshal's office—as extortion. " official malversation, or other such improper ex- " ercise of the office. Of course, the crime of " gambling was noue of these things.

" Was it neglect of duty? In one sense, it un- " doubtedly was so. In that sense in which it " would have been a neglect or violation of any " one's duty. It is clearly the duty of every per- " son to abstain from gambling, and so, of course, " it was the duty of this Marshal. But this is not " the sense in which the term was used. It was " plainly employed in the sense of neglect of " official duty—his duty as Marshal—not as a " good citizen. What his official duty was, the " ordinances will show. The following are the " official duties which, it is supposod, he has vio- " lated:

" 1. It is made his duty, by the charter, ' upon " ' notice, in writing, from the Mayor, or any " ' member of the Council, to prosecute all offend-

" 'ers against the laws of the State, for crimes
" 'committed in the city of Macon." And in case
" of any offense committed in his presence, or
" within his knowledge, 'it shall be his duty to
" prosecute, without notice.' Here is a clear and
" definite duty prescribed, a violation or neglect
" of which would seem to be a sufficient cause for
" the removal of this officer, if the Mayor and City
" Council themselves had not, by their ordinance,
" otherwise enacted. We find that in the 5th sec-
" tion of the ordinances, under the head *Marshal*
" *and Deputy Marshal*, it is declared that it shall be
" the duty of the Marshal to prosecute all offenders,
" etc., in the city of Macon. And if he shall 'fail
" 'or refuse to do so, when notified so to do, by the
" 'Mayor or any member of Council, he shall be
" 'removed from his office.' Here the corporation
" have plainly restricted their right to remove
" this officer for not prosecuting, to cases where
" he shall fail or refuse to prosecute, after being
" notified so to do.

" It is not pretended that the defendant in error
" failed or refused to prosecute on this occasion,
" after being notified, nor was this the charge.
" Indeed, it does not appear, by the record, that
" he did not prosecute. He could not, therefore,
" for this cause, have been removed.

" 2. Similar observations may be made in rela-
" tion to the duty of the Marshal, as prescribed
" by the 3d section of the ordinances under this
" head.

"3. The duty of the Marshal, prescribed by the "8th section of the ordinances under the head "*Nuisances*, as cited by the learned counsel for "the plaintiff in error, requiring that officer to "'arrest all persons offending against the public "safety, morality, or decency,' does not apply to "cases of gambling, but to cases of nuisance, or "*quasi* nuisance. This Marshal did not violate "that section therefore.

"4. Neither does the 7th section, under the "head *Marshal and Deputy Marshal*, apply to cases "of gambling, but to cases of disorder, drunken- "ness, or riot in the streets.

"These are all the duties of the Marshal which "have been referred to, as having been violated "by the defendant in error. And it must be very "plain to every one that the act of gambling, "charged and proven against this defendant in "error, was not such a neglect of the duties im- "posed by these ordinances, as authorized the dis- "missal of the Marshal, according to the charter, "unless the act of gambling, *in itself*, constituted "such neglect of duty. That it did constitute "neglect of *official* duty we cannot think. He had "no warning to this effect—no notice, that if, "while holding the office, he gambled he would "be dismissed—he did not take the office with "any such understanding; and though the act "was highly immoral and criminal, yet it was not "a neglect of duty, in the sense in which the "Legislature used the terms.

"We can but express regret that we have been "compelled, by a sense of our own duty, to take "this view of the case before us. It would have "given us great pleasure if we could have sus- "tained the Mayor and City Council of Macon in "the action which they have taken against this "defendant in error, who proved himself, in point "of moral conduct, so unworthy of the office "which he held. We would fain have given them "aid in the effort to suppress this abominable "vice of gambling in their community. They "need such aid, if this record is to be believed. "It is a sad report which it makes of the state of "morals, as regards this vice, in that flourishing "and thriving city. By the record before us, it "appears that not far from one hundred and fifty "presentments, for this offense, were made by the "grand jury, at the time this defendant in error "was presented, and that other persons, besides "the Marshal, charged with important official "duties, and responsible for the good order and "morals of the place, were, at the same time, put "under accusation, and afterwards punished for "this same offense of gambling. And we are "sorry, indeed, that we cannot, by our judgment, "aid those who, by rebuke and punishment of the "defendant in error, have manifested a desire to "lessen the frequency of this crime in a commu- "nity where it is so prevalent. If we have not "done so, it is only because we could not, and "yet have regard to those legal principles to which

" every citizen, however immoral his conduct may
" have been, has the right to look, as safeguards
" of his person and property."

In *Ex parte Harrold*, 47 Cal. 129, our Supreme Court say:

" The prisoner, who is the County Treasurer of
" San Joaquin County, was indicted for 'willfully
" omitting as a public officer to perform a duty
" enjoined by law upon him.' The offense, as
" charged in the indictment, is his failure, during
" a specified period, to reside at the county seat
" of his county. He is now held in custody by
" virtue of a bench-warrant issued by the County
" Court, after having been tried and found guilty
" as charged in the indictment. The only ques-
" tion we shall consider is whether the indict-
" ment charges the commission of a public of-
" fense.

" It is provided by the 176th section of the Penal
" Code, that 'every willful omission to perform
" any duty enjoined by law upon a public officer
" or person holding any public trust or employ-
" ment, where no special provision shall have
" been made for the punishment of such delin-
" quency, is punishable as a misdemeanor.' The
" The Political Code (Sec. 4119), provides that
" certain county officers, among whom is the
" County Treasurer, must reside at the county seats
" of their respective counties.

" It is claimed on the part of the prosecution,

" that it is an official duty of the defendant, as
" the Treasurer of the county of San Joaquin, to
" reside at the city of Stockton, the county seat
" of that county. The duty enjoined by law,
" within the meaning of Section 176, Penal Code,
" is an official duty. It is an Act to be performed
" by the incumbent of the office, in his official
" capacity. It is not a qualification or condition,
" which a person must possess in order that he
" may be eligible to, or continue to hold, an
" office. Should it be provided by competent
" authority that no officer should absent himself
" from the State for more than thirty days, or
" that he should not discharge the duties of his
" office after he had attained the age of sixty
" years, those provisions would amount to condi-
" tions, upon which the incumbent's right to hold
" the office depended, but they would in no
" sense constitute official duties—duties pertain-
" ing to his office. Provisions to the effect that
" a person shall not be eligible to a particular
" office who is not of a designated age, or a resi-
" dent or elector of the proper county, district,
" etc., are qualifications which he must possess in
" order that he may be eligible to, and hold the
" office, but they clearly are not duties pertaining
" to the office. We are not called upon in this
" case to express any opinion as to the power of
" the Legislature to impose upon a constitutional
" officer a new or additional condition, affecting
" the tenure of his office or his right in any re-

" spect to hold the same; but it is sufficient in " this case to say, that the neglect with which the " defendant is charged by the indictment is not " the neglect of a 'duty enjoined by law,' within " the meaning of Section 176, Penal Code. It is " not claimed that the defendant is liable to " punishment under any other section of the " Penal Code. The indictment, in our opinion, " does not charge any offense. The prisoner is " therefore entitled to be discharged from custody, " and it is so ordered."

See also—

Baggs' case, 11 Coke Rep. 93.

Rex vs. *Richardson*, 1 Burr, 517 (3 Geo. 11).

On the morning after the above argument was made, the Court (composed of five Judges) rendered the following

Decision.

JUDGE CARY: This is a proceeding to remove Isaac S. Kalloch, Mayor of the city of San Francisco, from office, under the provisions of an Act of the Legislature of the State of California, entitled "An Act providing for the removal of civil officers for violation of official duties," approved March 30, 1874. The complaint sets forth at large the various acts committed by the respondent, charged as being in violation of his official

duties, and in that behalf alleges: First, that he did on divers occasions deliver certain intemperate, inflammatory, and scandalous harangues. Second, that he corruptly asked and secured gratuities and rewards for obtaining and furnishing employment to sundry persons in the public offices of the city. Third, that he solicited and accepted free railroad passes.

There is a general demurrer to the complaint, upon the ground that on the face of it it appears that the delinquencies complained of were not committed by respondent in course of his official duties as Mayor, and are therefore not within the operation of the statute.

The statute referred to provides that any officer of the State may be removed from office in the following cases:

First. If guilty of a willful violation of any of the provisions of the statute under which he was elected or appointed.

Second. For a willful violation of any statute prescribing or defining his duties and powers, or passed for his government and control.

Third. If guilty of any other violation of official duty.

We are all of the opinion, that in order to remove an officer for a violation of any of the foregoing provisions of the statute, it must appear, both by allegation and proof, that the act performed by him was an official act, committed

either in the corrupt or negligent performance of a duty growing or springing out of the fact that he is an officer in the performance of the duties of his office, or in a willful or corrupt neglect to perform his official duties.

It was never intended that this statute could be utilized to deprive an officer of his office because he is a ward politician or a corrupt and dangerous man, or one given to making indiscreet or inflammatory speeches. Laws of a different character, providing for a widely different mode of procedure, are in force to meet such cases, by the punishment and removal of the offender from office. It was clear to us that the acts charged in the complaint as a ground for the removal of the respondent from his office were not performed by him under color of, or by virtue of, his position as Mayor of the city and county of San Francisco. It is not our purpose, however, at this time, to state at large our reasons for this conclusion. To do so opens up a field of debate altogether too extensive. The questions arising in this case up to this point have been elaborately presented, and have been discussed with distinguished ability on both sides, rendering it quite unnecessary for the Court to do more than announce its decision, and that is:

First. That the scope and purpose of the Act of 1873–4 was to provide a summary remedy for the removal of public officers guilty of nonfeas-

ance or misfeasance in office in the course of their official duties, and not otherwise.

Second. That the acts charged against the respondent were not committed by him in the course of, or in the line of, his official duties as Mayor, but as a private citizen, and we therefore hold that he is not within the meaning or operation of the statute, or of the mischief against which it so carefully provides.

It results that the demurrer must be sustained and the proceedings dismissed, and it is so ordered.

CARY, Judge.

(Judge Latimer agreed with his associates on all points except that which related to railroad passes—Article XII, Section 19, of the Constitution—upon which point he filed a dissenting opinion.)